United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT ALBERT D. DORSEY

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALBERT D. DORSEY, Appellant	)	
v.	)	No. 19,307
UNITED STATES OF AMERICA, Appellee	)	

54

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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RE 7-5900

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALBERT D. DORSEY, Appellant	)	
v.	)	No. 19,307
UNITED STATES OF AMERICA Appellee	)	

PORTIONS OF THE TRIAL TRANSCRIPT WHICH APPELLANT DESIRES THE COURT TO READ

The undersigned counsel for the Appellant hereby submits the following list of pages of the trial transcript which it is desired that the Court read:

pp. 19-65

pp. 99-120

pp. 156-160

ROBERT E. O'MALLEY

Attorney for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Whether a purposeful delay of four months between the date of an alleged violation of Federal narcotics laws and appellant's arrest therefor, followed by a subsequent delay of five and one-half months before appellant was tried, constituted a violation of the due process clause of the Fifth Amendment to the United States Constitution when the delay between offense and arrest was not for the purpose of searching for the appellant or improving the case against him, and the delay prejudiced the appellant's ability to defend himself.

2. Whether it was "plain error" affecting appellant's substantial rights within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure for the district court to define the concept of reasonable doubt for the jury in terms indicating a degree of doubt upon which a person might "have no hesitancy in relying upon" in determining important affairs of his everyday life, rather than in terms of the degree of doubt which would cause a person to hesitate and pause in determining the more important affairs of his everyday life.

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INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (con't)

Cases	Pages
Tatum v. United States, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951)	29
Taylor v. United States, 95 U.S. App. D.C. 373, 222 F.2d 398 (1955)	30

United States Constitution

Fifth Amendment	1, 11, 12, 14, 17, 18
Sixth Amendment	17

United States Code

Title 21, § 174	6, 10
Title 26, § 4704(a)	6, 10
Title 26, § 4705(a)	6, 10
Title 28, § 1291	6

Rule 52(b), Federal Rules of Criminal Procedure	1, 11, 12, 15, 28, 29, 30

*/ Cases principally relied upon.

JURISDICTIONAL STATEMENT

On February 25, 1965, appellant was convicted in the United States District Court for the District of Columbia on a three-count indictment charging violations of the Federal narcotics laws. 21 U.S.C. § 174, 26 U.S.C. §§ 4704 (a), 4705(a). (Tr. Pl. 12) */ He was sentenced to a five year prison term on each of the first and third counts of the indictment, and a term of 20 months to five years on the second count, the sentences to run concurrently. (Tr. Pl. 13) On March 26, 1965, the district court authorized an appeal in forma pauperis and the appeal was noted on the same date. (Tr. Pl. 16) The jurisdiction of this Court is based on 28 U.S.C. § 1291.

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*/ References to the pages of the original record in the district court are designated as "(Tr. Pl. ___)". References to the trial transcript are designated as "(Tr. ___)".

STATEMENT OF THE CASE

On May 7, 1964, Private Carl W. Brooks of the District of Columbia Metropolitan Police Department, acting in his capacity as an undercover narcotics investigator, purchased six capsules of narcotics for $9.00. (Tr. 21, 23-24) The purchase occurred at about 6:10 p.m. on the sidewalk in front of a restaurant at 1352 U Street, N.W., in the District. (Tr. 22, 24) Private Brooks testified at the trial of this case that the defendant (appellant) Dorsey was the man who sold him the narcotics. (Tr. 22, 24) The defendant Dorsey took the stand, denied the sale, and stated that he had never seen Private Brooks before the trial. (Tr. 104, 115-116)

The background of this case is as follows: from February 17, 1964, until September 9, 1964, Private Brooks operated as an undercover agent for the Metropolitan Police Department and during that period apparently made many random purchases of contraband narcotics. (Tr. 20, 42, 45) The particular sale which is the subject of this case occurred under the following circumstances: about 6:10 p.m. on May 7, 1964, Private Brooks was walking south on the east side of 14th Street, N.W., near the intersection of U Street. (Tr. 22) Brooks was accompanied by two men identified as Ernest Tomlinson and Charles Williams and a third unidentified companion. (Tr. 22) At this time, Brooks noticed a man (whom he identified at the trial as the defendant

Dorsey) walking north on the west side of 14th Street approaching U Street. (Tr. 23) Tomlinson hailed this man, who then proceeded to cross 14th Street and continued walking east on U Street. (Tr. 23) According to Brooks, when the defendant was approximately in front of 1352 U Street, Brooks said to him "six", and gave him $9.00, in return for which the defendant allegedly handed Brooks six capsules containing a white powder. (Tr. 24) About ten or fifteen minutes elapsed from the time Brooks' group first saw the seller until the sale was consummated. (Tr. 51) Thereupon, Brooks left the scene and subsequently delivered the capsules to another officer of the police department the following day. (Tr. 26) Sometime within the next two weeks, a chemical analysis revealed that all of the capsules contained heroin hydrochloride. (Tr. 78, 90)

The police did not arrest Dorsey until September 9, 1964, four months and two days after the alleged sale. (Tr. Pl. 2) The only evidence offered by the Government to explain this delay was Brooks' testimony that his "undercover investigation would have to close" (Tr. 28) if an earlier arrest was made.

Private Brooks' version of the transaction in question was "corroborated" by the testimony of Ernest Tomlinson, one of Brooks' companions on the day in question.

(Tr. 47-52) It developed that, as of the time he testified, Tomlinson had previously been arrested and convicted four times on various charges in the District between 1958 and 1964 (Tr. 55-56), that Tomlinson had volunteered his services as an informer to the police department sometime in March of 1964 (Tr. 70-71), that on the date in question he was operating as a paid informer for the police department (Tr. 34, 48), that he did not know the defendant by name (Tr. 52), that he had participated as a confederate with Brooks in many purchases of contraband narcotics (Tr. 63), and that at the time of the trial he was serving a suspended one year sentence on account of a conviction for unlawful entry in September of 1964. (Tr. 60, 61) Although Charles Williams, another of Brooks' companions on the day in question, was apparently well known to Brooks and had been used by Brooks to some extent on previous occasions (Tr. 40, 41) as an unwitting purchaser, the Government did not call Williams as a witness at the trial.

The defendant Dorsey as a witness on his own behalf denied any part in the transaction in question. (Tr. 104, 115, 116) Dorsey testified that his regular place of employment during 1963 and most of 1964 was a delicatessen near the intersection of 14th and T Streets, N.W. (Tr. 100), that he lived above the delicatessen (Tr. 113), and

acknowledged that he therefore might well have been in the vicinity of 1352 U Street, N.W. on the day the alleged sale took place. (Tr. 119) However, due to the fact that Dorsey's trial took place nearly ten months after the date of the sale in question, Dorsey was not able to recall precisely his activities and whereabouts on May 7, the date in question, other than to state his general recollection that he probably was working at his job in that vicinity on that date. (Tr. 118-120) Dorsey has no previous arrests or convictions on narcotics charges. (Tr. 106)

Following Dorsey's arrest on September 9, 1964, he was indicted on October 26, 1964, in a three-count indictment under sections 4704(a) and 4705(a) of Title 26 of the United States Code and section 174 of Title 21 of the United States Code, charging him with the possession and sale of six capsules of narcotics to Private Brooks. (Tr. Pl. 6-7) Dorsey's trial was originally scheduled for the week of December 14, 1964, but it was rescheduled for the week of February 1, 1965, pursuant to the following entry on the district court docket:

> "12/9/64. Trial date cont. from week of 12/14/64 to week of 2/1/65. Bond case -- jail cases to be given priority on trial calendar. (Per Assignment Office)."

Following a short delay at the request of the defendant, Dorsey was tried in the district court (McGarraghy, J.) on February 23 and 24, 1965. The jury began its deliberations at 3:25 p.m. on February 24, was dismissed for the evening at 4:50 p.m., resumed its deliberations at 10:00 a.m. the following morning, February 25, and ultimately returned a verdict of guilty on all three counts of the indictment at 10:55 a.m. on February 25. (Tr. Pl. 10-12, Tr. 170-171, 175-176)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

Rule 52(b), Fed. R. Crim. Proc.:

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

1. The delay of four months and two days between the alleged violation of law and the appellant's arrest therefor was a deliberate delay on the part of the Government which was not justified by reason of the failure to locate appellant or the necessity for preparing the case against him. This delay deprived appellant of his right to a fair trial because he was unable to recollect his whereabouts on the day in question and therefore was unable to defend himself adequately. As a result, appellant's rights under the due process clause of the Fifth Amendment to the United States Constitution were violated and the district court committed error in failing to dismiss the indictment against the appellant on this ground.

> With respect to Point 1, appellant desires the court to read particularly the following pages of the transcript of the trial: Tr. 27, 28, 51, 105-106, 118-120.

2. The following instruction by the district court to the jury constituted "plain error" affecting appellant's substantial rights so as to require a reversal of his conviction pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure:

> ". . . [I]f after a fair comparison of all the evidence you can say that you have an abiding

> conviction of the Defendant's guilt, such a conviction as you would have no hesitancy in relying upon in determining the more weighty and important affairs of your own everyday lives, then you do not have a reasonable doubt and may find him guilty."

The district court's definition of reasonable doubt should have been expressed in terms of the degree of doubt which would cause a person to hesitate and pause in the more important affairs of his everyday life, and should not have been defined in terms of the degree of doubt notwithstanding the existence of which a person would have "no hesitancy" in acting. Since this was the only definition of reasonable doubt given by the district court to the jury, this was a "plain error" which affected the substantial rights of the appellant and requires a reversal of his conviction.

> With respect to Point 2, appellant desires the court to read particularly pages 158 and 159 of the trial transcript.

SUMMARY OF ARGUMENT

I

The four month delay in charging appellant with the offense which is the subject of this case deprived appellant of the opportunity to defend himself adequately and resulted in an unfair trial in violation of the appellant's rights under the due process clause of the Fifth Amendment to the United States Constitution. The sole reason for the delay was to avoid exposing the identity of the Government's undercover narcotics investigator to whom the appellant allegedly made an illegal sale. A desire on the part of the Government merely to conceal for an indefinite period the identity of an undercover narcotics investigator is not, at least in the circumstances of this case, a valid justification for a deliberate four month delay in arresting appellant for an alleged violation of law.

The delay seriously prejudiced appellant because the offense charged was alleged to have been committed during a ten to fifteen minute period in the course of a routine day and the appellant, when apprised of the charge, quite naturally was unable to reconstruct his activities during the critical ten to fifteen minute period on the day in question. The appellant himself took the stand and denied

the charge but testified candidly that he could not remember precisely where he was or what he was doing during the ten to fifteen minute period on the day in question. Consequently, since the Government's delay was deliberate, unreasonable, and prejudicial to the appellant, the indictment should have been dismissed.

II

The district court defined the concept of reasonable doubt for the jury in terms of the degree of doubt on which a person would not hesitate to act, rather than in terms of the degree of doubt which might cause a person to hesitate and pause before acting in an important matter concerning his own affairs. This instruction by the district court was contrary to repeated rulings on this precise point by this court. Although appellant did not object to the district court's charge, the district court's erroneous instruction in the circumstances of this case was "plain error" requiring a reversal under Rule 52(b) of the Federal Rules of Criminal Procedure because this was a very close case in which the resolution of the defendant's guilt or innocence depended solely on the jury's understanding of the meaning of reasonable doubt. If the district court had

defined the term in accordance with the phraseology consistently approved by this court ("the kind of doubt which would cause a person to hesitate and pause before taking action"), the jury might well have acquitted the appellant.

ARGUMENT

I

The Government's Deliberate Delay of Four Months and Two Days Between the Alleged Offense and Appellant's Arrest Therefor Was Unreasonable and Prejudicial to Appellant

The testimony of the Government's witnesses establishes that the case against appellant was complete within about two weeks after the alleged violation of law. Nevertheless, the Government deliberately refrained for an additional three and one-half months from placing any charges against appellant. Ultimately, after an additional delay (only about 25 days of which was at the request of appellant), he was tried about nine and one-half months after the date of the alleged offense.

In Nickens v. United States, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963), a division of this court held that a defendant's Sixth Amendment right to a speedy trial does not come into play until after the commencement of criminal proceedings. Appellant accepts this holding but urges that the delay preceding appellant's arrest in this case, if not proscribed by the Sixth Amendment, is nevertheless a denial of due process under the Fifth Amendment

to the Federal Constitution. Indeed, the court in Nickens discussed this precise issue:

> "[D]ue process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused; . . .." 116 U.S. App. D.C. at 340, n.2; 323 F.2d at 810, n.2.

Although certain delays in the interests of the proper administration of justice may be condoned, a delay that is "purposeful or oppressive" cannot be tolerated. Pollard v. United States, 352 U.S. 354, 361 (1957).

In this case, it is undisputed that the four month delay between offense and arrest was "purposeful." The issue then is whether this purposeful delay was reasonable under the circumstances and, if not, whether the delay so prejudiced appellant's ability to defend himself that his Fifth Amendment due process rights were infringed. */

A. The Delay Was Unreasonable

Only one of the Government's witnesses purported to justify the four month delay in this case and his

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*/ See Ross v. United States, No. 17,877 D.C. Cir., Jan. 28, 1964, where this court remanded the case to the district court for a hearing to determine "the reasonableness vel non of the delay occurring between the alleged offense by appellant and appellant's arrest therefor, and its effect, if any, on the defense of the case . . .."

testimony on this point was brief, cryptic, superficial and generally uninformative (Tr. 27, 28):

> Q. [By Government counsel] All right, sir. Now this incident happened on May 7, that you have testified about, and you say that the warrant was not obtained until September 9.
>
> A. That is correct, sir.
>
> Q. Can you explain to His Honor and the jury why it took so long to obtain the warrant?
>
> * * *
>
> A. At that time I was working in an undercover investigation and the investigation was not complete, and if I had obtained the warrant for Mr. Dorsey at that time, it would reveal me as a police officer and the undercover investigation would have to close.

Obviously, the foregoing testimony is nothing more than a self-serving statement by a Government agent as to <u>why</u> the delay occurred. It cannot by any standard be considered a satisfactory legal <u>justification</u> for a particular course of police conduct which in this case (see discussion at pp. 21-25 <u>infra</u>) precluded any possibility of an effective defense by the accused.

Conceivably, a purposeful delay of this type might be justified on the ground that the undercover investigation had just begun, or that many important contacts and arrests were made after the incident in question which could not have been made if the agent immediately revealed himself, or that the defendant was -- or at least was thought to be -- a member of an entrenched ring of narcotics sellers, the members of which had to be secretively and slowly tracked down. Admittedly, lengthy undercover investigations are an absolute necessity in many branches of law enforcement. The results of such investigations are often not constitutionally objectionable because the delay is usually for the specific purpose of gathering adequate evidence against a defendant or group of conspirators and in any event the defendant is not prejudiced because the nature of the charge -- generally a long-continued course of criminal conduct -- is one which can be defended adequately regardless of the delay.

This is a much different case. This defendant was asked to account for his behavior during a fifteen minute period in the course of a routine day in answer to a charge of which he was completely unaware for more than four months after the day in question. The innocent defendant --

the unfairly accused -- under such circumstances is almost certainly doomed. An innocent defendant in such a case often could not purport to state positively what he was doing or where he was during a ten-minute period on a particular day eight or nine months prior to the trial. If he attempted to do so, he undoubtedly would be subjected to a rather heavy-handed display of skepticism by the prosecuting attorney. All the defendant can do -- as this one did -- is deny his guilt but admit that he cannot reconstruct his activities during a fifteen-minute period on a day which occurred nearly ten months before. In short, the four month delay in charging this defendant was a purposeful, unreasonable and unjustified delay under the circumstances of this case.

B. <u>The Delay Prejudiced Appellant</u>

The trial transcript indicates clearly that appellant was prejudiced by the four-month delay in placing a charge against him. At his trial on February 24, 1965, the following testimony was elicited (Tr. 118-120):

> Q. [By Government counsel] Now, sir, let me ask you this: Where were you on May 7 of 1964?
>
> A. Where were I?
>
> Q. That is right.

A. I couldn't tell you.

Q. You don't have any recollection of where you were?

A. No.

Q. Do you remember --

A. I couldn't try to tell you. If I did, I would tell you something I didn't know.

Q. Were you working on that date?

A. I think that I was. I mostly work around the carry out. Mack would always keep me there so I could help him out. Most times I would spend my time there. That is why I was on 14th Street.

Q. Your best recollection is that you were in that vicinity on that date, is that right?

A. Yes, sir.

Q. Do you recall being in the vicinity of 14th and U, that is, on the corner of 14th and U on that date?

A. Do I recall being on the corner?

Q. That is right.

A. No, I can't say I was on the corner. I can say I went around the corner and probably to a restaurant, maybe across the street to the show, but I couldn't say where I was any specific place because I don't know. That has been almost five or six months ago, maybe eight.

Although some defendants might be tempted to claim falsely that they do not remember certain events, it

is much more likely that a defendant subject to such a temptation would instead simply construct a false alibi. Moreover, it is a rare defendant who consciously believes that his defense will be aided by his simple claim that he does not remember the events of a certain day. Consequently, there can be no doubt that the appellant's candid admissions that he did not remember precisely where he was or what he was doing during a brief 15-minute period on the day in question were truthful statements which were intended by him as nothing more than his explanation as to why he was unable to present a more effective defense to what he considered a groundless charge.

Appellant in this case could have obtained an acquittal only on the condition that he present to the jury a clear and convincing statement of his behavior and activities during a period of approximately ten or fifteen minutes on a date which occurred almost ten months prior to the trial. His inability to do this was a direct result of the Government's unreasonable delay in apprising the appellant of the fact that he would ever be called on to reconstruct his activities on May 7, 1964. As one member of this court has stated:

> "[A] suspect may be at a special disadvantage when complaint or indictment, or arrest, is

> purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags." Nickens v. United States 116 U.S. App. D.C. 338, 343, 323 F.2d 808, 813 (concurring opinion) (1963).

A review of the record in this case provides ample proof that the Government's delay and the consequent impairment of the appellant's ability to defend himself was the single most important factor -- indeed, the only factor -- which induced the jury to find the appellant guilty. The Government did not have a strong case against the appellant. It had only the testimony of the narcotics agent whose alleged transaction with the appellant consumed only about ten or fifteen minutes on a day nearly ten months prior to the trial. The credibility of the Government's "corroborating witness" was reduced virtually to zero by reason of the disclosure of his many previous convictions, the fact that at the time of the trial he was serving a suspended sentence, and other evidence which indicated that he was a volunteer informer and had

participated with this particular narcotics agent in many other transactions. The narcotics agent testified (Tr. 42, 45) that he had participated in "innumerable" transactions of the type involved in this case and the jury might well have drawn the inference that the narcotics agent under these circumstances could not reasonably be expected to be 100% accurate in his identification of all of the sellers. The jury could not reach a verdict on the day the case was submitted to it and altogether its deliberations consumed nearly three hours, an unusually long period of deliberation by the jury in a case of this type. In short, this was a very close case in which the balance swung in favor of the Government because of the defendant's inability to construct an adequate defense, and the conclusion is inescapable that this presumably innocent defendant was precluded from presenting an adequate defense solely because of the Government's deliberate delay in charging him with a violation of law.

II

It Was Error for the District Court to Instruct the Jury on the Definition of Reasonable Doubt in Terms Indicating the Degree of Doubt on Which a Person Would Not Hesitate To Act Instead of in Terms of the Degree of Doubt Which Might Cause a Person To Hesitate and Pause

The only definition of reasonable doubt which the district court gave to the jury was the following (Tr. 158-159):

> ". . .[I]f after a fair comparison of all the evidence you can say that you have an abiding conviction of the Defendant's guilt, such a conviction as you would have no hesitancy in relying upon in determining the more weighty and important affairs of your own everyday lives, then you do not have a reasonable doubt and may find him guilty."

Recently, in Scurry v. United States, No. 18,633, D.C. Cir., decided April 15, 1965, this court disapproved a virtually identical instruction which was in the following terms:

> "[I]f . . . you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters in your own affairs, then you have no reasonable doubt . . .."

The deficiency in the district court's instruction in the instant case is this: a prudent person might have "no hesitancy" in taking some necessary action on an important

matter in his everyday life notwithstanding the existence of some degree of uncertainty as to whether he was doing the right thing. Nevertheless, even though he acts without hesitancy, "such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment." Scurry v. United States, supra, Slip Op., p. 4. In Scurry the court repeated its rule on this point by quoting from Holland v. United States, 348 U.S. 121, 140 (1954):

> "We think this section of the charge [on reasonable doubt] should have been in terms of the kind of doubt that would make a person hesitate to act, see Bishop v. United States, 71 App. D.C. 132, 107 F.2d 297, 303, rather than the kind on which he would be willing to act."

This court has consistently held that the definition of reasonable doubt should be given to the jury in terms of the kind of doubt which would cause a person to hesitate and pause, rather than in terms of the kind of doubt despite which a person might be willing to act without hesitation:

> Egan v. United States, 52 App. D.C. 384, 393, 287 Fed. 958, 967 (1923).
>
> > "A reasonable doubt may be defined to mean . . . such a doubt as in the graver and more important transactions of life, would cause a reasonable and prudent man to hesitate and pause."

Bishop v. United States, 71 App. D.C. 132, 138, 107 F.2d 297, 303 (1939).

> "[Reasonable doubt means] such a doubt as would cause reasonable men to hesitate to act upon it in matters of importance to themselves."

Jones v. United States, ____ U.S. App. D.C. ____, 338 F.2d 553, 555 (1964).

The appellant did not object at the trial to the district court's definition of reasonable doubt, but there can be no question that this particular instruction constituted "plain error" which affected appellant's substantial rights so as to require a reversal pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure. As noted above, this erroneous definition of reasonable doubt was the only definition of the term given by the district court to the jury so the error was not cured by any correct supplementary definition. In addition, the prejudice resulting from this incorrect definition of reasonable doubt was magnified by the district court's somewhat careless admonition regarding the defendant's presumed innocence (Tr. 158):

> "Now, in this case as in all criminal cases, this Defendant is presumed to be innocent of the crimes alleged, and that presumption of innocence remains with him throughout the course of the trial until overcome by evidence establishing his guilt beyond a reasonable doubt." (Emphasis added)

The district court's use of the word "until" unfortunately might well have conveyed to the jury the notion that the presumption of innocence would inevitably be overcome by the Government's evidence at some point in the proceeding. Appellant suggests that the use of the word "unless" would have been much more appropriate, and that the combined effect of this careless phraseology, together with the district court's erroneous instruction immediately thereafter as to the definition of reasonable doubt, was a "plain error" which under the circumstances of this case prejudiced the appellant's substantial rights.

The district court's instructions on this point might not have constituted reversible error if the evidence of appellant's guilt in all respects was overwhelming. But this was a very close case. As this court remarked in Mullen v. United States, 105 U.S. App. D.C. 25, 26, 263 F.2d 275, 276 (1958), "the jury might well have acquitted appellant but for the erroneous charge. We therefore reverse under F.R. Crim. P. Rule 52(b) . . .." In Tatum v. United States, 88 U.S. App. D.C. 386, 388-389, 190 F.2d 612, 614-615 (1951), this court said:

> "It has always been the custom of this Court, however, in cases of serious criminal offenses to check carefully the record for error prejudicial to defendant which he did not urge."

This accords with Rule 52(b) of the Federal Rules of Criminal Procedure."

In Taylor v. United States, 95 U.S. App. D.C. 373, 379, 222 F.2d 398, 404 (D.C. Cir. 1955), the court said "[w]e have repeatedly applied [Rule 52(b)] to errors in . . . instructing juries."

In summary, this is clearly one of those classic criminal prosecutions in which the jury's understanding of the meaning of reasonable doubt is the single most critical factor in the ultimate determination of whether the defendant shall be acquitted or found guilty. Surely in such a case the defendant is entitled to have the concept of reasonable doubt explained to the jury in precisely the same terms which this court has consistently required on many occasions over a period of many years. The United States Supreme Court has stated that "a conviction ought not to rest on an equivocal direction to the jury on a basic issue." Bollenbach v. United States, 326 U.S. 607, 613 (1946). A conviction in this circuit cannot stand where there is an instruction on a critical issue which is not only equivocal but contrary to this court's repeated rulings regarding the content and phraseology of the particular instruction.

CONCLUSION

Because of the Government's deliberate four-month delay between the commission of the alleged offense and appellant's arrest therefor -- a delay which was unreasonable and never satisfactorily explained or justified by the Government -- appellant's ability to defend himself at the trial was sericusly impaired. For this reason, appellant respectfully requests that his conviction be reversed and that this court order the dismissal of the indictment. In the alternative, appellant is entitled to a new trial because the district court did not correctly define the concept of reasonable doubt in its instructions to the jury.

Respectfully submitted,

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RE 7-5900

Attorney for Appellant
(Appointed by this Court)

Dated: June 14, 1965

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the brief of appellant on David C. Acheson, Esq., United States Attorney, by causing a copy thereof to be deposited in his office in the United States Courthouse, Washington, D.C.

ROBERT E. O'MALLEY

Attorney for Appellant
(Appointed by this Court)

Dated: June 14, 1965

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,307

ALBERT D. DORSEY, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
JEROME NELSON,
Assistant United States Attorneys.

Cr. No. 950-64

QUESTIONS PRESENTED

1. Whether a delay of four months between offense and arrest, is, under the circumstances of this case, a "plain error."

2. Whether aspects of the court's instructions, dealing with reasonable doubt and with the presumption of innocence are error, and if so, whether "plain error."

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,307

ALBERT D. DORSEY, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After a jury trial in the District Court (McGarraghy, J.) appellant was convicted under a three count indictment involving the sale of narcotics not from the original stamped package and without the authorized order form (21 U.S.C. 174; 26 U.S.C. 4704(a), 4705(a)). He was sentenced to five years imprisonment on the sale and order form counts, and to 20 months to five years imprisonment on the stamped package count, all sentences to run concurrently.

The offenses arise out of one sale occurring on May 7, 1964. Appellant was arrested on September 9 of

1964, and the principal issue on appeal relates to this four month delay between offense and arrest. The facts may be summarized as follows:

The purchase was made by one Brooks, a police officer working in an undercover capacity. While Brooks was a relative newcomer to the local police force, he had served for six years with the Narcotics Squad of the Baltimore City Police Department (Tr. 20). At about 6 p.m. on the day in question Brooks was walking on the street together with one Tomlinson—a "special employee"—, one Williams, and an unknown party (Tr. 21-22). Brooks saw the defendant at the corner of 14th and U Streets, where he stopped after Tomlinson hailed him (Tr. 23). Brooks, Williams, and the unknown followed Tomlinson across the street to where the appellant was standing. The group then proceeded to walk back across the street again, and during the course of this walk Brooks saw Williams give appellant some money and receive a quantity of capsules (Tr. 23, 30). As the men continued to walk, Brooks told appellant "six", meaning six capsules, and gave him nine dollars in police funds (Tr. 23-24). When they stood in front of the King of Wings Restaurant on U Street, appellant handed to Brooks six capsules eventually found to contain heroin hydrochloride (Tr. 24, 78). Brooks had no written order form and the capsules bore no tax stamp (Tr. 25).

Tomlinson appeared as a government witness and said that at the time in question he saw appellant give Brooks some capsules in exchange for money (Tr. 49). Tomlinson had several prior convictions, including one narcotics violation in 1958 (Tr. 54-57). One offense, an unlawful entry for which sentence was suspended, apparently occurred during the time he was functioning as a "special employee" (Tr. 60).

Appellant testified on his own behalf and denied making the sale in question, stating that he had never seen Officer Brooks prior to court apperances (Tr. 104, 115-

116). He said that he did not know Tomlinson, although he "could have" seen him before, "If he hang around that neighborhood I probably did" (Tr. 104, 116). During May of 1964, and for over a year prior, appellant was employed as the general manager of Mack's Delicatessen, around the corner from the Kings of Wings Restaurant where the sale was alleged to have occurred (Tr. 100-101, 105, 109, 114). As to his residence, appellant said "In 19—the time the sale was made, the sale was supposed to be made, I was living above the delicatessen" (Tr. 112).

Appellant could not remember where he was on the night in question, although he thought he was working (Tr. 119). When asked whether he was on the corner of 14th and U Streets he said

> "No, I can't say I was on the corner. I can say I went around the corner and probably to a restaurant, maybe across the street to the show, but I couldn't say where I was any specific place because I don't know. That has been almost five or six months ago, maybe eight" (Tr. 119-120).

In the course of Officer Brooks' testimony, he said that he recognized appellant on May 7, having seen him on several prior occasions (Tr. 26-27). When asked by defense counsel why he had approached appellant on the night in question, Brooks answered "Because I knew Mr. Dorsey was a seller of drugs" (Tr. 43). Counsel then asked "How did you know that?" and Brooks replied "Because I knew Mr. Dorsey from prior occasions" (Tr. 43). Appellant testified that he had never sold narcotics to anyone (Tr. 106). The government unsuccessfully sought to call Brooks in rebuttal, representing at a bench conference that Brooks had purchased narcotics from appellant two days prior to the sale at bar (Tr. 121)[1]

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[1] An indictment arising out of this May 5 sale was dismissed after the instant trial (Cr. 40-65).

Appellant made no motion on the ground of delay between offense and arrest. The question came into the case only when the prosecutor, on direct examination, asked Brooks to account for the delay. At this point the court asked defense counsel if he was "raising the question of the delay" and counsel said "Yes, I am" (Tr. 28). Brooks explained:

> "At that time I was working in an undercover investigation and the investigation was not complete, and if I had obtained the warrant for Mr. Dorsey at that time, it would reveal me as a police officer and the undercover investigation would have to close" (Tr. 28).

Brooks began his undercover work on February 17, 1964, continued until September 9, 1964, and made "innumerable" arrests during this period of time (Tr. 20, 28, 36-38, 42).

SUMMARY OF ARGUMENT

The delay of four months between offense and arrest is not a ground for reversal. In this area, where so much is said to depend upon passage of time, counsel should be required promptly to attack the delay by appropriate motion at trial. To authorize such contentions for the first time on appeal actually places a premium on delay and runs counter to the very purposes of the rule sought to be invoked. In any event, there was no "plain error" in the circumstances at bar. The testimony of the officer here was corroborated by the informer. The officer had several years experience in narcotics work. He does not appear to have been testifying from a notebook. The appellant was regularly employed as manager of a neighborhood delicatessen. The period involved, four months, was comparatively short. Under these circumstances the case is not at all like *Ross* v. *United States*, No. 17877, decided June 30, 1965, but is rather within the rationale of *Hardy* v. *United States*, —— U.S. App. D.C. ——, 343 F.2d 233 (1964) and *Bey* v. *United States*, No. 18611, decided July 20, 1965.

The use of the phrase "have no hesitancy in relying upon" in the reasonable doubt instructions must be objected to at trial. The use of the word "until", in relation to the presumption of innocence is not erroneous; if error, it also should be raised at trial. In this case appellant's retained counsel stated that he was "satisfied" with the charge; hence appellant should not now be heard to complain.

I. The delay of four months between offense and arrest is not plain error.

A. The point should not be raised for the first time on appeal.

This case was tried in February of 1965—long after the opinion in *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963), where this Court recognized that delayed arrest might be a ground for reversal. Remands from this Court for the purpose of exploring these delays began with the order of January 28, 1964 in *Ross* v. *United States*, No. 17877, decided June 30, 1965. Yet in the instant case counsel sought no relief on this ground, not even by way of the usual "speedy trial" motion.

Thus, appellant's retained counsel below had available a known remedy for relief from the alleged unreasonable delay. Having failed to utilize that remedy at the proper time in the proper court, appellant should not now be heard to complain. We think there are special reasons for requiring that this question in particular be raised at the earliest possible moment. Judge Wright has described the nub of the problem in these terms:

> "Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense." (Concurring in *Nickens supra* at p. 343).

Surely the delay is even further aggravated in the situation where a defendant goes through trial with a defense

and then, after losing on the merits, argues on appeal that the delay was unreasonable and prejudiced his defense. Such a procedure can only result in memories which have further dimmed and in witnesses who have disappeared. In *Ross* type hearings the trial court is confronted with the practical difficulty of trying to determine whether the defendant is telling the truth when he asserts lack of memory. If, because the defendant has not raised the question promptly, the proceeding occurs more than a year after the events in question, the difficulties are compounded. The proper administration of criminal justice always requires that issues be raised at the earliest possible stage of the proceedings. This policy should be particularly applicable to the issue at bar, which itself turns on questions of delay. We respectfully urge this Court to lay down a rule requiring that a defendant who objects to pre-arrest delay make his point by appropriate motion in the District Court.

B. *The delay here is not plain error.*

In this case the testimony of the undercover agent was corroborated by the testimony of the informer. Thus the case is materially different from *Ross* where the government's case was absolutely uncorroborated, a point which this Court emphasized at several points in its decision. Thus:

> "* * * convicted of a narcotics violation solely upon the testimony of an undercover policeman. No corroboration was forthcoming other than the drugs * * *"
> (S.O. pp. 1-2)
>
> * * * *
>
> "What we have, thus, in a case where, * * * apart from the narcotics, the Government's case consisted solely of a policeman's testimony * * *" (S.O. p. 3)
>
> * * * *
>
> "* * * the case against appellant consists of the recollection of one witness refreshed by a notebook."
> (S.O. p. 11).

Significantly in *Hardy* v. *United States*, —— U.S. App. D.C. ——, 343 F.2d 233 (1964), where this Court affirmed, despite delays of seven and eight months, the government case was corroborated, a factor clearly noted by the *Ross* Court:

> "*Hardy* did not involve the wholly uncorroborated testimony of an undercover policeman; a paid police informer, who claimed to have been an eyewitness to the sale, testified in support of the Government". (S.O. p. 10, fn. 4)

Thus the case at bar is plainly not *Ross* but *Hardy*. The significance of corroboration is readily apparent from the decision of this Court in *Powell* v. *United States*, No. 18,315, decided August 30, 1965, rejecting a claim based on delayed arrest.

Moreover, a four month period is not the same thing as a seven month period. In *Bey* v. *United States*, No. 18611, decided July 20, 1965, a case which apparently did not even include corroboration, this Court noted, in the course of rejecting an argument based on delayed arrest, that the period involved was "only three and one-half months" (S.O. p. 2).

In other respects the instant case is unlike *Ross*. There is no affirmative indication that Officer Brooks was reading out of a notebook, or that he would have been unable personally to recall the incident. Further, the officer in *Ross* was apparently of limited experience. Officer Brooks, on the other hand, while new to the local police force, had six years prior police experience in narcotics work, some of it as an undercover man. The status of the officer was also noted by the Court in *Bey*, where it was said that the officer there had federal training and two years' experience. Finally, this appellant is not entirely comparable with the defendant in *Ross*, who "* * * kept no diary or other record, received little mail, and, at the time in question, had no regular employment" (S.O. p. 7). This appellant, at the time of the offense and for over a year prior thereto, was regularly employed as the gen-

eral manager of a delicatessen. One who runs a neighborhood delicatessen, with all of its attendant contacts, is not wholly without aids to memory.

Under all of the circumstances, then—the presence of corroboration, the comparative shortness of the period involved, the absence of a "notebook" aspect, the relative experience of the officer, and status of appellant himself—we submit that the passage of but four months from offense to arrest does not amount to plain error.

II. The instructions on reasonable doubt did not involve plain error.

(Tr. 158-159, 169)

The instructions included the following:

> Now, in this case as in all criminal cases, this Defendant is presumed to be innocent of the crimes alleged, and that presumption of innocence remains with him throughout the course of the trial until overcome by evidence establishing his guilt beyond a reasonable doubt.
>
> There is no burden upon the Defendant to prove his innocence. The burden is on the Government to prove his guilt beyond a reasonable doubt. That means beyond a doubt based on reason, beyond a doubt for which you can assign yourselves a reason. It is not a doubt based on whimsical speculation or conjecture. It does not mean beyond any doubt or beyond all doubt. It means beyond a reasonable doubt. It does not mean proof to an absolute certainty or proof to a mathematical certainty. It means proof to a moral certainty.
>
> Stating it another way, if after a fair comparison of all the evidence you cannot say that you are satisfied of the guilt of the Defendant, then you have a reasonable doubt and should find him not guilty. On the other hand, if after a fair comparison of all the evidence you can say that you have an abiding conviction of the Defendant's guilt, such a conviction as you would have no hesitancy in relying upon determining the more weighty and important affairs of

your own everyday lives, then you do not have a reasonable doubt and may find him guilty. (Tr. 158-159).

If it was error to utilize the phrase "have no hesitancy in relying upon", then the point should have been preserved below. Counsel made no objection to this aspect of the instruction, and indeed, stated that with exceptions not here pertinent, "the defense is satisfied" (Tr. 169). The point is not "plain error". *Scurry* v. *United States*, No. 18663, decided April 15, 1965; *Johnson* v. *United States*, No. 18915 (S.O. P.2d, fn. 2), decided June 15, 1965; *McGill* v. *United States*, Nos. 18828, 18829, decided June 29, 1965.

The use of the word "until", in dealing with the presumption of innocence is not erroneous. *Allen* v. *United States*, 164 U.S. 492, 500 (1896); *United States ex rel. Marelia* v. *Burke*, 197 F.2d 856 (C.A. 3, 1952), *cert. denied*, 344 U.S. 868. In any event the question should not be raised for the first time on appeal. See *Las Vegas Merchant Plumbers Association* v. *United States*, 210 F.2d 732, 749 (C.A. 9, 1954); Rule 30, Fed. R. Cr. Pr.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT ALBERT D. DORSEY

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ALBERT D. DORSEY, Appellant	)	
v.	)	No. 19,307
UNITED STATES OF AMERICA, Appellee	)	

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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RE 7-5900

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(Appointed by this Court)

INDEX

TABLE OF CITATIONS

Preliminary Statement

The principal argument raised in appellant's original brief, filed June 14, 1965, was that the delay of four months and two days between the alleged offense and appellant's arrest therefor, followed by a subsequent delay of 5 1/2 months between arrest and trial, was an unreasonable delay which seriously prejudiced the appellant. Subsequent to the filing of appellant's brief, this Court has delivered seven opinions in cases which bear on this issue. These cases are: Ross v. United States, No. 17,877, decided June 30, 1965; Mackey v. United States, No. 18,525, decided June 30, 1965; Cannady v. United States, No. 18,392, decided July 14, 1965; Bey v. United States, No. 18,611, decided July 20, 1965; Powell v. United States, No. 18,315, decided August 30, 1965; Roy v. United States, No. 18,285, decided September 2, 1965; and Jackson v. United States, No. 18,597, decided September 13, 1965. There appears to be only one other decision of this Court on this issue. This is Hardy v. United States, ____ U.S. App. D.C. ___, 343 F.2d 233 (1964). In Ross, the defendant's conviction was reversed. In all of the other cases cited above, this Court rejected the

defendant's claim of prejudice resulting from a delay between the commission of the offense and arrest. Appellant believes that this case is clearly governed by Ross and that the holding in Ross compels a reversal of appellant's conviction. The following discussion in this brief will demonstrate why this is so and why the earlier Hardy case and the six cases decided subsequent to Ross are not dispositive of this case.

Appellant also urged in his original brief that, in any event, he is entitled to a new trial because the district judge erroneously defined the concept of reasonable doubt. Subsequent to the filing of appellant's original brief, this Court decided McGill v. United States, No. 18,828, decided June 29, 1965, in which the Court reaffirmed its prior holdings supporting appellant's claim on this point. As to this issue, the only question is whether the instruction constituted "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure.

I

THIS COURT'S DECISION IN ROSS V. UNITED STATES REQUIRES REVERSAL OF APPELLANT'S CONVICTION

Before discussing the reasons why this case is governed by the Ross decision, it is appropriate to indicate briefly why none of the other related cases, beginning with Hardy and continuing through Jackson (in all of which convictions were affirmed) is dispositive of this case. The most important factor common to all of these cases which clearly distinguishes all of them from Ross and the instant case is that in none of them did the defendant make any showing of prejudice resulting from the delay. The defense arguments in those cases consisted merely of a general non-specific allegation that the delay itself was prejudicial, but none of these defendants offered any specific evidence as to how they were in fact prejudiced by the delay. In Ross, as in this case, the prejudice is obvious: the defendant Ross testified, as did this appellant, that he simply could not remember or by any means reconstruct his activities on the day of the alleged offense. No claim of this sort was advanced by

the defendants in any of these other cases. In fact, in Cannady and Powell, the defendants presented alibi defenses.

Obviously, none of these cases call for an affirmance of appellant's conviction. On the contrary, appellant contends that Ross compels reversal of his conviction. As page 11 of the slip opinion in Ross indicates, the reversal in that case was based on the presence of three factors:

1) The purposeful delay of several months between offense and arrest;

2) Failure of memory on the part of the defendant, and

3) Lack of corroboration of the testimony of the Government's sole witness, a police officer.

Admittedly, the first two of these factors are present in this case. It is true that the delay in Ross was seven months and in this case less -- four months and two days, but if the defendant is in fact prejudiced by the delay -- as this one was -- the length of the delay is relevant only for purposes of determining the intrinsic reasonableness of the delay. If the delay is reasonable under the circumstances, then it is immaterial that the defendant is prejudiced. Was this delay reasonable? Appellant believes that it obviously was not. The only

justification for the delay presented by the Government was that it was necessary to protect the identity of the undercover narcotics investigator. This Court in Ross plainly held that that reason was not of itself sufficient to justify a delay which prejudiced the defendant. Here, as in Ross, there is no evidence that the delay resulted "only from arrangements which reflect a conscious effort to accommodate fairness and efficiency." Ross v. United States, Slip. Op., p. 6, n. 2. In any event, the Government has already recognized and admitted that this Court's holding in Ross regarding the reasonableness of the delay should govern this case. In footnote 1 on page 1 of the June 29 motion filed by the Government, there appears the following statement: "There is little likelihood that a remand here would produce anything beyond what was developed in the full hearing following the Ross remand, ... In our view, these questions can be dealt with on the basis of the investigative considerations and decisions outlined in that hearing."

With respect to the length of the delay, it should also be noted that, following a delay of 4 months between the alleged offense and appellant's arrest therefor, there was a subsequent delay of 5 1/2 months before

the appellant was tried. Only about 25 days of this subsequent delay is chargeable to the appellant. Consequently, the overall delay in this case between offense and trial was apparently about the same as in Ross, but this case presents a situation where the overall delay is, if anything, even more inexcusable than the overall delay in Ross because the Government, with full knowledge of the fact that the original 4-month delay between offense and arrest might well prejudice the appellant, nevertheless delayed an additional 5 1/2 months before bringing the appellant to trial.

The only significant factual difference between this case and Ross is that here the police officer's testimony was "corroborated" whereas corroboration was lacking in Ross. Otherwise, this case would present precisely the same "slender dimensions" which the Court found offensive in Ross. The circumstances here strongly suggest, however, that this factual difference is of no legal significance. As noted on page 9 of appellant's original brief, the character and criminal record of the Government's "corroborating witness" was such that, as a matter of law and plain common sense, the dimensions of the Government's case against the appellant were as slender after this

witness' testimony as they were before it. The Government's corroborating witness, one Tomlinson, was a volunteer paid informer who, at the time he testified, had already been convicted four times on various charges in the District between 1958 and 1964. Tomlinson did not know the defendant by name and had participated as a confederate with Officer Brooks in many purchases of contraband narcotics. At the time he testified, Tomlinson was serving a suspended one-year sentence on a conviction for unlawful entry in September 1964. Naturally, the record does not show whether the Government recommended a suspended sentence solely in order to obtain Tomlinson's testimony in this and other cases, but, since Tomlinson had previously been convicted three times on other charges, it is a fair inference that the Government at least acquiesced in a suspended sentence on the fourth charge as a condition to obtaining additional testimony from Tomlinson in narcotics cases.

In short, under all the circumstances it cannot conceivably be said that Tomlinson's testimony, as a matter of law, was any better than no corroborating testimony at all. The Government no doubt will urge that individuals with criminal records such as Tomlinson's are the only ones

available as informers and must necessarily be used as corroborating witnesses and that, in any event, all of the foregoing criticisms of Tomlinson affect only his credibility and that it is up to the jury to believe him or not. These Government counter-arguments may well be valid ones in a normal case, but they have no merit in a case such as this where the Government's delay has effectively deprived the defendant of any opportunity which he might otherwise have had to contradict or disprove the testimony of a "corroborating witness" who clearly has both the opportunity and motivation to give false testimony.

Appellant does not contend that corroborating testimony counts for nothing in a case of this type. Appellant's argument is simply that the record in this case conclusively shows that the Government's corroborating witness is, by any standard, an unprincipled and untrustworthy individual who is at best only vaguely familiar with the facts about which he is testifying and who for various reasons has a vested interest in assisting in the conviction of this defendant; that, regardless of whether the jury might have resolved its doubts in favor of this witness' credibility, for purposes of determining as a

matter of law the extent to which the appellant was prejudiced by the delay, this corroborating testimony is equivalent to no corroboration at all.[1]

II

THE TRIAL JUDGE'S INSTRUCTION DEFINING REASONABLE DOUBT WAS PLAIN ERROR

The Government does not seriously dispute appellant's argument that the trial judge's instruction on reasonable doubt was erroneous. McGill v. United States, No. 18,828, decided June 29, 1965, reaffirms appellant's contention on this point. The question is whether this is "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure. It is true, as the

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1/ Although the record in this case does not disclose whether both Tomlinson and Officer Brooks lacked personal recollection of the alleged sale by the appellant, the record in another case in this Court indicates that Brooks followed the now familiar practice of keeping a notebook and referring to it before his testimony in various trials and that Tomlinson did not maintain a notebook, but refreshed his recollection by reference to Brooks' notebook. Brooks made a total of 93 purchases during the period he was operating under cover. See Worthy v. United States, No. 19,279, Tr. 31-33, 38-40, 212-213.

Government notes, that in Scurry,[2] Johnson,[3] and McGill,[4] this Court held that the reasonable doubt instruction which appellant questions here was not "plain error". There are two important distinctions between this case and those: as the Court noted at page 13 of the slip opinion in McGill, "neither counsel nor the judge had the benefit of the storm signals flagged by this Court for the traditional reasonable doubt charge." This exculpatory statement cannot be applicable to the trial judge in this case since this trial, in February, 1965, occurred nearly eight months after this Court's decision in Jones v. United States, ___ U.S. App. D.C. ___, 338 F.2d 553 (1964). Secondly, in all of the cases where this Court has held that the erroneous charge was not "plain error", it has been influenced to do so by reason of the fact that the trial judge in those cases had given a second definition of reasonable doubt which

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2/ Scurry v. United States, No. 18,633, D.C. Cir., decided April 15, 1965.
3/ Johnson v. United States, No. 18,915, D.C. Cir., decided June 15, 1965.
4/ McGill v. United States, No. 18,828, D.C. Cir., decided June 29, 1965.

was correct. This was not so at the trial of this case. The only definition given by the District Judge was the wrong one. This was a very close case and the jury might well have acquitted appellant but for the erroneous charge. If this is not "plain error", it is difficult to see what is.[5/]

Respectfully submitted,

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Dated:

September 14, 1965

5/ See Mullen v. United States, 105 U.S. App. D.C. 25, 26, 263 F.2d 275, 276 (1958), where the Court said "the jury might well have acquitted appellant but for the erroneous charge. We therefore reverse under F.R. Crim. P. Rule 52(b) . . . ." In Tatum v. United States, 88 U.S. App. D.C. 386, 388-389, 190 F.2d 612, 614-615 (1951), this Court said:

> "It has always been the custom of this Court, however, 'in cases of serious criminal offenses to check carefully the record for error prejudicial to defendant which he did not urge.' This accords with Rule 52(b) of the Federal Rules of Criminal Procedure."

In Taylor v. United States, 95 U.S. App. D.C. 373, 379, 222 F.2d 398, 404 (D.C. Cir. 1955), the Court said "[w]e have repeatedly applied [Rule 52(b)] to errors in . . . instructing juries."

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the reply brief of appellant on the United States Attorney for the District of Columbia by causing a copy thereof to be deposited in his office in the United States Courthouse, Washington, D. C.

(signed) Robert E. O'Malley

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Attorney for Appellant
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Dated: September 14, 1965